IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 194 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GHANCHI RAZAK ALIBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 194 of 2003

MR ASHISH M DAGLI for Petitioner No. 1-2

Ms.B.R.Gajjar, learned A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 10/04/2003

ORAL JUDGEMENT

1. By judgment and order dated 23.1.03, 6th Fast Track Court, Junagadh in Special Case no. 32 of 1993,

convicted the appellants for the offences punishable under Section 27 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short N.D.P.S.Act) and sentenced them to suffer rigorous imprisonment for three months. The appellants were given the benefit of set off under Sec. 428 of Criminal Procedure Code.

2. Originally there were six accused but only accused no. 1 Ghanchi Razak Alibhai and accused no. 4 Altaf Mohammed Nagori were convicted whereas the other four accused were acquitted.

3. It is the case of the prosecution that on 11.4.92 at about 00.05 hrs. Police constable Parbat Danabhai, Police constable Devshibhai Becharbhai and others were on routine combing and at 01.10 hrs. one supertaxi bearing no. GJ.11-T-2011 came in a suspicious condition and therefore it was stopped and there were six persons sitting inside. On search of each person, one person who was driving the taxi by name Razak Ali was having a knife and cash of Rs.12,135/-, one Kasam Abtullah was having a knife and Rs.78/-, one Altaf Mohammed Nagori was having Rs.50/-, Nasir Satar Nagori and Iqbal Ali Ganchi were having Rs.554/- and Mohammed Husain Kasammiya was having Rs.180/-. On further checking of the taxi, two packets of liquor and 4 gm of ganja and 3 gm of charas and pipe with a small cotton cloth were also seized under panchanama. Thereafter, the taxi was also seized and all the six accused were charged under Sec. 66-B and 81 of the Prohibition Act, Sec. 27 of the N.D.P.S.Act and the accused no. 1 & 2 were also charged under Sec.135 of the B.P.Act. Panchanama was drawn and the complainant filed complaint before the Junagadh Police City Station, Junagadh. The scientific analysis confirmed that the seized goods were narcotic drugs. Regular chargesheet was filed against all the six accused and presented before the concerned Court, Junagadh.

4. The defence of all the accused before the trial court was that none of the accused were in conscious possession of the muddammal articles, as alleged by the prosecution. Moreover, none of the accused were the owner of the taxi in question. At the time arguments, it is the defence of the appellants that there is violation of mandatory provisions and therefore they should be acquitted.

5. In support of the case, the prosecution examined eye witnesses and also produced evidence to prove that the accused no. 1 & accused no. 4 were guilty of Sec. 27 of the N.D.P.S.Act and the trial court came to the

conclusion and convicted both the appellants as stated above. Dissatisfied with the said judgment and order, the present appellants have filed this criminal appeal under Sec. 374(2) of the Criminal Procedure Code.

6. It was submitted by the learned advocate for the appellants that two panchas who were examined turned hostile. It is further contended that except evidence of police witnesses, there is no other independent evidence to support the case of the prosecution. Neither of the appellants were found to be in conscious possession as defined under Sec. 54 of the N.D.P.S.Act. There is no evidence regarding the ownership of the vehicle, on the contrary the ownership of the vehicle is of one Abdul Sattarbhai. The said person is neither accused nor witness of the prosecution. Therefore, the ownership of the alleged vehicle was not proved in the eye of law and therefore also the appellants cannot be said to be in conscious possession of the vehicle. According to the learned advocate for the appellants, there is a break in chain of events to prove that the muddammal articles reached the F.S.L. through proper channel as much as the person who took the muddammal to the F.S.L. has not been examined. According to the appellants' advocate no report as contemplated under Sec. 57 of the N.D.P.S.Act was ever submitted to the superior of the investigating officer after search had been completed. Therefore, there is violation of mandatory provisions. According to the learned advocate for the appellants, after the muddammal articles were seized, the same was kept in the personal custody of the investigating officer. Under the N.D.P.S.Act, all preventive action to safeguard the custody of the muddammal article has to be taken. Sec. 55 of the Act says that it is obligatory upon the officer-in-charge of the police station to take charge of and keep in safe custody, pending the orders of the Magistrate all articles seized under this act within the local area of that police station and which may be delivered to him. This section provides a safeguard of mandatory nature for the accused qua the nature of seal in order to rule out the possibility of tampering with the sample. In view of this as the basic infirmities in the investigation carried by the investigating officer, the charge against the appellants is not proved beyond reasonable doubt and therefore they are entitled for acquittal.

7. Learned advocate for the appellants in support of his submissions, relied on the following decisions :

1. Rubyana @ Smita Sanjib Bali V/s State of

Maharashtra reported in 1996 Cri.L.J. 148.

2. Hakkam Singh V/s Union territory, Chandigarh reported in 1998 Cri.L.J. 528.

3. Nilamani Sahu V/s State of Orissa reported in 1997 (2) Crimes 116.

4. State of Punjab V/s Kulwant Singh reported in 1995 Cri.L.J. 744.

5. Rattan Lal V/s State reported in 1987(2) Crimes 29.

6. Gurbax Singh V/s State of Haryana reported in 2001 Cri.L.J. 1166.

7. Phool Kumar V/s State (Delhi Administration) reported in III (1997) CCR 179.

8. Against the aforesaid submissions, Ms. Gajjar learned A.P.P. for the State submitted that when the vehicle was stopped by the police personnel, the persons were perturbed which shows that they were in conscious possession of the contraband articles or at least they were knowing that they are having the possession of the drugs such as ganja and charas with wine. Under the circumstances, though the vehicle was not owned by them, they were in possession of the contraband articles. Further in the submissions of learned A.P.P. when the muddammal articles went to the F.S.L. for analysis, they were in sealed packet. If there was any tampering with the seal, then the F.S.L. authorities must not have accepted the same or must have stated so while accepting the muddammal. Nothing comes on record and therefore there is a reason to believe that the muddammal articles were with the police officer and there was no tampering which would favour the acquittal. Therefore, there cannot be said to be a missing link even though the person who carried the muddammal articles was not examined as witness by the prosecution side. The police officers, runs the submissions of learned A.P.P., who were in night patrolling were not knowing that the taxi in question which was driven by the accused no. 1 was carrying contraband articles and therefore there is no question of asking the occupier of the vehicle regarding the search to be taken by the Magistrate or not. In view of the aforesaid circumstances, there is no need for this Court to interfere with the order passed by the learned trial court Judge and appeal of the appellants is required to be dismissed.

9. I have gone through the authorities cited by the learned advocate for the appellants and also gone through the judgment and order of the trial court. The conscious possession of the contraband articles is discussed in the judgment of Rubyana (supra), in para 6 wherein the Apex

Court has also relied on the other authorities. It is observed as under :

" The term "possession" is not defined in the N.D.P.S.Act. The term "possession" has been judicially construed to mean, in various decisions, as under "

Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and that he can exercise it. Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity to the object.

The Apex Court in Supdt. and L.R. V.Anil Kumar Bhunja (1979) 4 SCC 274:(1979 Cri.L.J. 1390), observed that the test for determining "whether a person is in possession of anything is whether he is in general control of it."The Apex Court, after examining Salmond's jurisprudence and other earlier decisions rendered by the Court, observed thus (at pp 1392-93 of Cri.L.J.) :

" 13.Possession is a polymorphous term which may be have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of possession uniformally applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorising it is that of possession. Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Ed.1966) caused by the fact that possession is not purely a legal concept. Possession implies a right and a fact, the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, 11th Ed.).

14. According to Pollock and Wright, when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that possession is not a purely legal concept but also a matter of fact,

> Salmond (12th Ed. page 52) describes possession, in fact" as a relationship between a person and thing. According to the learned author the test for determining whether a person is in possession of anything is whether he is in general control of it."

In view of the aforesaid discussion, I am of the opinion that the vehicle in question does not belong to either of the appellants and is belonging to one Abdul Sattarbhai. The said Sattarbhai is not witness nor is examined at the time of the trial. He would be main person who would throw light on the actual possession of the contraband articles. In view of the aforesaid discussion, I am of the opinion that the contraband articles were not in actual possession of the appellants-accused.

10. Now I am dealing with the provisions of Sec. 55 of the Act. According to this Section, officer-in-charge of the police station shall take charge of and keep in safe custody, pending the orders of the Magistrate all articles seized under this Act within the local area of that police station and which may be delivered to him. It further makes it obligatory on the officer in charge of the police station to allow any officer who may be accompanying such articles to the police station or who may be deputed for this purpose to affix his seal on the said article or to take sample and from them and all such samples taken shall also be sealed with the seal of the officer-in-charge of the police station. the evidence of the present case shows that p.w. 5 P.I. Mr.Barad who was serving as city P.I. in Junagadh city at the relevant time has admitted in his cross-examination that he failed to report to higher officer and inform regarding the combing. In further cross, he admitted that till he sent the articles to F.S.L., it remained in his personal custody and further admitted that he did not obtain any orders from the concerned Magistrate and also did not obtain any receipt for the muddammal articles sent to the F.S.L., He also admitted that he did not send the panchanama to the concerned Magistrate through the P.S.O. and also did not send the report to the higher officer on completion of the work. The articles of charas and ganja were seized from the box opposite the seat of the driver. The witness has admitted in his cross-examination that in the statement of panchas it has not been mentioned that articles were found from the box opposite the seat of the driver. Both the panchas have also not supported the prosecution case and turned hostile. Nothing material comes out in the further cross-examination of the witness.

11. The learned trial court Judge has erred in coming to the conclusion that both the appellants were in conscious possession of the muddammal articles, more so, when the person was driving the vehicle, he must be in knowledge of the goods lying in the taxi belonging to him alone along with accused no. 4.

12. The trial court has erred in coming to the conclusion that when the law says that on completion of the investigation, the I.O. is bound to send the report to the authorities and by not sending the same, there would be violation of mandatory provisions. In view of the aforesaid circumstances, there is complete violation of Sec. 57 of the N.D.P.S.Act for which the benefit should go to the present appellants-accused.

13. In view of the aforesaid discussion, I am of the opinion that there is violation of mandatory provisions and therefore the judgment and order of the trial court is required to be quashed and set aside. Therefore, I pass the following order ;

14. The appeal is allowed. The judgment and order of conviction passed by the learned Special Judge, Fast Track Court, Junagadh in Sessions Case no. 32/93 dated 23.1.03 is quashed and set aside. The appellants be released forthwith, if they are not required in any other case. Direct service is permitted.

(SHARAD D DAVE, J)

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